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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 577

LEROY ALPHONSO HAITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 2–5) is reported at 295 F. 2d 489. The opinion of the district court (P. App. 10–14)[1] is not reported.

[1] The record filed in this Court includes the appendices to the briefs filed by petitioner and respondent in the Court of Appeals for the Third Circuit. These appendices will be cited respectively as "P. App." and "R. App." plus the page reference.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 1961 (Pet. 2). The petition for a writ of certiorari was filed on November 30, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the record was sufficient to show that the grand jury returned the indictment in open court.
2. Whether the indictment failed to inform petitioner with sufficient definiteness and certainty of the acts which allegedly tied him to the conspiracy to violate the liquor laws.
3. Whether the district court erred in finding the evidence sufficient to support petitioner's conviction of the conspiracy charged in the indictment.

STATEMENT

Petitioner was found guilty under count 1 of an indictment returned in the United States District Court for the Eastern District of Pennsylvania which charged petitioner and 18 other defendants with a conspiracy to violate the Internal Revenue laws relating to the manufacture, distribution and sale of distilled spirits. It was alleged that the plan and purpose of the conspiracy was (a) to engage in the business of a distiller without having given the required bond (26 U.S.C. 5601(a)(4)); (b) to possess a still without registering it (26 U.S.C. 5179(a)); (c) to make mash for distillation on premises other than an

authorized distillery (26 U.S.C. 5222(a)(1)); and (d) to transport, possess, buy, sell, and transfer distilled spirits in containers without the required tax stamps (26 U.S.C. 5205(a)(2)) (P. App. 16–17). The indictment charged that petitioner had performed the following overt acts in furtherance of the conspiracy (P. App. 17):

> (g) Approximately three times a week, between November 1, 1959 and February 9, 1960, *Leroy Haith* and *Jacqueline Haith* turned their automobile over to Lewis M. Hiatt, who took said automobile to Pittman, New Jersey, loaded it with untaxpaid distilled spirits, produced at the illicit distillery on the Old Schmidt Place, on Hunt Road, Bedminister Township, Bucks County, Pennsylvania, and accepted delivery of said automobile, so loaded, at points previously agreed upon by the parties.

The evidence of petitioner's participation in the conspiracy may be summarized as follows:

Hiatt, the chief prosecution witness who was named as a co-conspirator but not indicted (P. App. 16), testified that early in November 1959 he met petitioner at a Howard Johnson Restaurant on the northbound side of the New Jersey Turnpike just below the Mt. Holly and Burlington exits (P. App. 17–18). Petitioner was alone in a two-door 1959 Buick bearing Virginia license plates (P. App. 18, 19). The trunk of the car had been altered to give greater storage space (R. App. 2b–3b). Hiatt told petitioner how many cases of "goods" he had for him, and also informed him where to meet Eddie

Kensil (a co-defendant and the principal operator of the illicit distillery). Hiatt drove petitioner's Buick to the distillery "drop" at Pitman, New Jersey, where he loaded it with 20 six-gallon cases of liquor and drove it to a different Howard Johnson's located on the southbound side below Route 73 in New Jersey (P. App. 19, 23). Hiatt then got out of the Buick, put the key under the mat and walked toward Eddie Kensil's car from which he observed the petitioner getting out. Petitioner, according to Hiatt, proceeded to drive south on the New Jersey Turnpike with the load of liquor (P. App. 19–20).

The same procedure was followed for some 50 or 60 deliveries between November 1959 and February 1960. Petitioner "came up" about every other day in the same two-door Buick and in about 30 transactions his wife was with him (P. App. 20–23, 25). Petitioner or petitioner and his wife would switch cars with Hiatt. Hiatt would take their car and pick up the liquor at the drop. He would drive to a different location where he would find petitioner or, if present that day, petitioner and his wife "in the vehicle that I brought to the original place * * *" (P. App. 23). The parties would again switch cars and petitioner would leave with the liquor stowed in the oversized trunk. On two or three occasions petitioner paid Hiatt around $500 and once petitioner's wife paid this amount. Hiatt always told petitioner how many cases he had, and petitioner would report how many bottles had broken during the previous trip and were owed to him (P.

App. 23–24). There were no federal tax stamps on the jars of liquor (P. App. 26).

Motions for judgment of acquittal on grounds of the insufficiency of the evidence were made by petitioner and his wife who was also named a defendant. In a lengthy opinion reviewing the sufficiency of the evidence, the court denied petitioner's motion but granted the motion of his wife. (P. App. 10–14.)

The jury found petitioner guilty on count 1 and sentenced him to imprisonment for 3½ years and to pay a fine of $250 (P. App. 15). Petitioner appealed to the Court of Appeals for the Third Circuit alleging as grounds for reversal of his conviction the three contentions advanced in the instant petition. The court of appeals affirmed.

ARGUMENT

1. There is no merit to petitioner's attack upon the indictment on the alleged ground that the record did not show that it had been returned in open court by the grand jury (Pet. 10–13). The contention was raised for the first time in the court of appeals and properly disposed of as both untimely and without merit (Pet. 2–3).

The district court clerk's minute sheet shows that the court was in session on June 2, 1960, trying a civil case and that at 4:30 p.m. on that date the grand jury returned with 18 true bills (P. App. 28) The docket entry shows that the true bill was returned on that date (P. App. 1). On the first page of the original indictment there is a notation that it was

filed on June 2, 1960, and the last page is endorsed "a true bill" by the foreman of the grand jury (Pet. 3). The foregoing record entries are sufficient under the decided case law to show that the indictment was properly returned by the grand jury. No "set form of phraseology" is requisite for such a showing. *United States* v. *Glasser*, 116 F. 2d 690, 695 (C.A. 7), affirmed on this point although reversed on other grounds, 315 U.S. 60, 65, 66. Moreover, petitioner's right to raise this technical objection, not shown to have prejudiced him, was lost by his failure to make it at the first opportunity in the district court. Cf. *Breese* v. *United States*, 226 U.S. 1.[3]

2. There is also no substance to petitioner's attack upon the sufficiency of the indictment on the grounds that it was indefinite, did not inform him that he had joined the conspiracy and did not allege a connection between his acts and the plan of the conspirators (Pet. 13-22).[4] This contention was fully reviewed and correctly disposed of by the court of appeals which held (Pet. 3):

> We think an attack upon this indictment on the ground that it fails to tell the defendant what he is being charged with is not well taken. A reasonable interpretation of the language cer-

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[3] *Renigar* v. *United States*, 172 Fed. 646 (C.A. 4), is not in point since in that case, unlike the situation here, the facts adduced showed that the grand jury foreman entered the court room alone and delivered the indictment to the clerk when the court was not in session and the judge was conferring with attorneys in chambers (see 172 Fed. at 647).

[4] As with petitioner's first point, this claim was raised initially on appeal and is therefore not open for consideration except in very limited circumstances not shown to be present here.

> tainly charges him with being a party to the conspiracy and sets out very definitely his role in it."

Since petitioner was named as a conspirator in the indictment, it was not necessary that there be an explicit statement to the effect that he joined in the conspiracy in that portion of the charge describing his overt acts in furtherance of the conspiracy. As the court below pointed out, the language describing his overt acts specifies "very definitely" petitioner's role (Pet. 3). The indictment need not spell out the particular way in which his overt acts furthered the conspiracy; it was sufficient for the indictment to charge, as it did (P. App. 17), that the overt acts were committed in the furtherance of the conspiracy. *Frohwerk* v. *United States,* 249 U.S. 204, 209; *Marron* v. *United States,* 8 F. 2d 251, 258 (C.A. 9); *Haywood* v. *United States,* 268 Fed. 795, 805 (C.A. 7), certiorari denied, 256 U.S. 689; *Gruher* v. *United States,* 255 Fed. 474, 477 (C.A. 2). It was not necessary that the overt act itself be a criminal act. *United States* v. *Rabinowich,* 238 U.S. 78, 86; *Braverman* v. *United States,* 317 U.S. 49, 53. Neither was it required, as petitioner suggests, that the indictment allege with technical precision the elements of the offense which was the object of the conspiracy, or state such object with the detail required in an indictment for committing the substantive offense. *Wong Tai* v. *United States,* 273 U.S. 77, 81.

3. As his third point, petitioner seeks to renew in this Court a contention that the evidence was insufficient to support his conviction (Pet. 23–37). This

claim has already been heard and denied in full opinions by the district court (P. App. 10–14)* and the court of appeals (Pet. 4–5). In addition, it was rejected by the jury under instructions to which petitioner took no exception (P. App. 5). Petitioner presents no new or valid ground for this Court to grant a third judicial review of evidence three times previously found sufficient for conviction. See *Kann* v. *United States*, 323 U.S. 88, 93; *United States* v. *Johnson*, 319 U.S. 503, 518; *Delaney* v. *United States*, 263 U.S. 586, 589–590.

This is not a case involving only one seller and one buyer so that there could be no conspiracy conviction as in *Norris* v. *United States*, 34 F. 2d 839 (C.A. 3). The jurors were correctly instructed in accordance with *Norris* that, if they found only simple sales between Hiatt and petitioner alone, petitioner would not be guilty of the conspiracy (P. App. 3). Here, the regularity of petitioner's meetings with Hiatt, the way in which delivery was made and the large quantities involved justified the inference that petitioner knew that the liquor came from an illegal distillery and was an active participant in its distribution and sale. Here there was, with respect to the buyer of an illegal commodity, the type of "informed and interested cooperation" with a "stake in the venture" which this Court, in *Direct Sales Co.* v. *United States*, 319 U.S. 703, 713, held sufficient to justify a verdict that a seller was

* The care with which the district court reviewed the evidence is attested by the fact that it granted the companion motion for acquittal filed by petitioner's wife (P. App. 14).

a co-conspirator of the buyer. See also *United States* v. *De Vasto*, 52 F. 2d 26, 30–31 (C.A. 2), certiorari denied, 284 U.S. 678; *United States* v. *Bruno*, 105 F. 2d 921, 922–923 (C.A. 2), reversed on other grounds, 308 U.S. 287; *United States* v. *Tramaglino*, 197 F. 2d 928, 930 (C.A. 2), certiorari denied, 344 U.S. 864.

Petitioner concedes that the indictment charges only one conspiracy and that it was not necessary that the evidence show that he knew the identity or number of his confederates or their precise functions or the exact source of the liquor sold or transferred to him (Pet. 26, 32, 34). Petitioner's complaint appears to be that the evidence failed to show that he knew that the liquor transferred to him was produced and manufactured by members of the conspiracy (Pet. 26). The very concessions made by petitioner appear to make such evidence unnecessary. Thus, the district court, which like the court of appeals heard and denied the same contention, ruled (P. App. 11, 13):

> Haith thus knew of an illegal combination to possess, transfer, sell, etc., untaxed spirits.
>
> * * * * *
>
> It was not a sine qua non that he know the exact source of the alcohol so long as that source lay within the known general design and purpose. As stated in *United States* v. *Andolschek*, 142 F. 2d 503, 507 (2d Cir. 1944), when a party to a conspiracy "embarks upon a criminal venture of indefinite outline, he takes his chances as to its content and membership, so be it that they fall within the common purposes as he understands them."

As this Court said in *Blumenthal* v. *United States*, 332 U.S. 539, 557, the law permits "the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all its details or of the participation of others." See also *United States* v. *Sansone*, 231 F. 2d 887, 892, 893 (C.A. 2), certiorari denied, 351 U.S. 987.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1961.